

No. 18703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CRUZ YBARRA, HERMAN VASQUEZ, and FRANK TORRES,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

JURISDICTION

and

STATEMENT OF THE CASE.

The Federal Grand Jury for the Southern District of California returned Indictment No. 31634-CD on January 3, 1963, charging appellants with violating Title 21, United States Code, Section 174. On February 4, 1963, appellants pleaded not guilty and trial was set for February 18, 1963. On the latter date, appellants waived jury and proceeded to trial before the Honorable Jesse W. Curtis, United States District Judge. On February 20, 1963, the court found all appellants guilty of the conspiracy charged in Count One, and also found them guilty on each of the substantive counts with which they were charged, except for appellant Vasquez, who was found not guilty on Counts

Four and Five. Appellants' motion for judgment of acquittal or new trial, filed March 13, 1963, was denied by the court on March 18, 1963. On the same day sentence was imposed and appellants gave notice of appeal.

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.
STATUTE INVOLVED.

Title 21, United States Code, Section 174, provides in pertinent part:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. . . .

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

III.

STATEMENT OF FACTS.

On October 29, 1962, Agent Joseph Baca of the Federal Bureau of Narcotics accompanied Ronald Varela, a Special Employee of the same Bureau, to the vicinity of Rose Hills housing project in El Sereno, California, after having instructed Varela to introduce him to Ybarra in an attempt to purchase heroin. [R. T. 13, 15.] Agent Baca observed Varela meet Ybarra. [R. T. 13.] After about 15 minutes, Varela rejoined Agent Baca in a Government vehicle and they left the area. [R. T. 16, 21-22.]

On October 30, 1962, Agent Baca and the Special Employee, Varela, drove together to Lombardi's Liquor Store on Huntington Drive in the Los Angeles area. Upon arriving at the liquor store, Agent Baca observed Ybarra pass through the front of the store. Agent Baca and Varela alighted from the car and proceeded toward Ybarra, but the latter walked away from them toward the rear of the store. They waited for a short period and then re-entered their vehicle and drove away. [R. T. 16-17.] Upon passing a market on the corner of Monterey Road and Huntington Drive, Agent Baca observed Ybarra and Torres standing next to a vehicle in the parking lot. He parked the car across the street from the market and Varela got out, crossed the street, and met with the two appellants. After a short period, Varela returned to the Government vehicle. [R. T. 17-19.]

On October 31, 1962, Deputy Sheriff Penn R. Weldon searched Varela, gave him \$250, and transported him to North Broadway and Huntington Drive in Los

Angeles. There, Varela boarded a bus which Weldon followed to Huntington Drive and Monterey Road where Varela alighted. [R. T. 27.] Varela walked north on Monterey Road to the Saratoga Bar where he met Ybarra. Together they proceeded to a nearby vacant lot and conversed. Then they walked a short way north on Browne Avenue and were met by Vasquez, who was seated on a blue Honda motorbike. All three conversed, and then Vasquez rode off on the motorbike and Varela and Ybarra walked to the corner of Topaz and Huntington Drive North. A few minutes later, Vasquez reappeared on the motorbike, Varela climbed on the bike behind him and together they rode north on Topaz to Pytites where they turned left and disappeared from view. [R. T. 26-28, 69-70, 104-105.] Ybarra walked west on Huntington Drive and at the corner of Topaz he was greeted by people who said "Hello, Shorty! Hello, Shorty! How are you?" Ybarra smiled in response. [R. T. 70-71.] As Ybarra walked further up Topaz, some children were playing in the street and one said "Hi, Shorty!" He waved in reply. [R. T. 28.]

Approximately ten or fifteen minutes later Deputy Weldon picked up Varela and received from him Exhibit 1. Agent Richard Rock then appeared, searched Varela, obtained Exhibit 1, and later mailed it to the United States Chemist in San Francisco. [R. T. 30, 105-106.]

On November 6, 1962, at approximately 5:30 P.M., narcotic Agent Francis L. Briggs, in the company of Deputy Henry and Agent Rock, searched Varela, supplied him with \$875, instructed him to make payment

of \$375 for the heroin received on October 31, and to purchase another quantity of heroin and make a partial payment of \$500 therefor. [R. T. 191.]

The Special Employee, Varela, was then transported to North Broadway and Mission Road in Los Angeles, where he and Deputy Henry boarded a bus. Agent Briggs followed the bus to Monterey Road and Huntington Drive South where the Deputy and Varela slighted. [R. T. 191.]

Varela crossed the street alone, stood in front of a Chevron Gas Station, and walked back and forth. At the same time, near a driveway at 5420 Huntington Drive South, Ybarra was crouched in the shadows observing Varela. [R. T. 192.] Subsequently, Varela again crossed the street and Ybarra met him. They both entered a '49 or '50 Chevrolet and Ybarra drove on Huntington Drive to Topaz Street where he turned right and was lost from view. [R. T. 107-108.] More than an hour later Agent Briggs picked up Varela and received Exhibit 2 from him. He searched Varela and later mailed the Exhibit to the United States Chemist in San Francisco. [R. T. 193-194.] Both Exhibits 1 and 2 were found to contain heroin. [R. T. 9-10.]

On November 12, 1963, Agent Briggs placed a Fargo transmitting device on the person of Varela who then accompanied Agent Baca by car to Huntington Drive South and Monterey Road where both remained for more than an hour, during which time none of appellants appeared. [R. T. 194-195.] Thereafter Agent Baca and Varela drove into the Rose Hills housing project; Varela left the car, and the following conversa-

tion, in substance, was heard by narcotic officers over the Fargo receiver:

Varela: (whistle) Hey, Shorty?

Ybarra: Yeah.

Varela: Shorty, what happened to you guys? I was supposed to meet Homer over at the place and you guys didn't show up.

Ybarra: The meeting wasn't for tonight, it's set for tomorrow night.

Varela: No. The last time I saw you we made arrangements to meet tonight.

Ybarra: You are getting your dates mixed up. You should use the number system. Instead of remembering days you should remember the date.

Varela: Did Homer tell you I want to see Hank?

Ybarra: Yes, he did.

Varela: Is he going to meet me tomorrow night?

Ybarra: I don't know.

Varela: Well, I'm gonna have four or five thousand dollars and I want to buy a lot of stuff.

Ybarra: Crazy.

Varela: Will this transaction have to go like the last time? I don't want to be walking all over the hills because I might be arrested.

Ybarra: I think it will be a little bit different. How did you get here tonight?

Varela: My partner drove me up here.

Ybarra: Where is he?

Varela: He is parked down the street.

Ybarra: We told you never to bring anyone over.

Varela: The only reason he is here with me is so I'll have a way to get here. He doesn't necessarily want to meet you either.

Ybarra: We don't want anyone around. If anyone sees any of us we are through and won't deal with you any longer. Do you want to pick up anything now? If you can wait ten minutes I can get you something now.

Varela: I've got to leave to take my mother to the hospital. I can't buy any narcotics now. Can we change the meeting spot to some other place?

Ybarra: The original spot is fine; there is nothing wrong with it.

Varela: I don't want to take a chance of getting arrested. The area has a notorious reputation for narcotic peddlers and I might be arrested walking around there.

Ybarra: If you are picked up or stopped by the police, tell them you just got out of school.

Varela: I am quite certain I don't look like a schoolboy.

Ybarra: Come back tomorrow as we agreed, but be careful. It is nearing Christmas and the secret grand jury indictments will be out soon. Make sure you are not followed and don't bring anyone else." [R. T. 33-35, 161-164, 195-198.]

The next day, November 13, 1962, Varela was escorted by narcotic officers to Huntington Drive South and Esmeralda. After walking about this area Varela was met by Ybarra in the vicinity of the Chevron Gas Station and they conversed for 15 or 20 minutes. Varela was wearing a Fargo transmitter but officers could

not obtain any reception therefrom. [R. T. 36, 198-199.]

On November 14, 1963, Varela met narcotics officers who searched him and furnished him \$500. Agent Rock instructed him not to part with this money unless he was able to meet Torres. [R. T. 109.] Thereafter, Varela was transported to the vicinity of Huntington Drive South and Turquoise Street, where he got out of the car. Vasquez then appeared on the blue Honda motorbike and Varela got on the rear. [R. T. 37, 110.] Followed by narcotic officers in a 1959 black Ford Ranchero, Vasquez and Varela drove in a circuitous route from Huntington Drive South to Monterey Road, up Monterey Road to Browne, down Browne to McKenzie to Florizel, west on Florizel to Boundary, south on Boundary to Mercury, on Mercury back to Monterey Road to Armour to a small grocery store which is located at the latter intersection. [R. T. 73-74.]

Vasquez and Varela entered the store, came out and drank from a bottle. Both got back on the motorbike and proceeded in a weaving fashion to the top of a steep hill on Armour street where it joins Florizel. From the top of this hill, one could see the route the Ford Ranchero had taken in following the motorbike. [R. T. 74-75, 110-111, 138-139.] About 45 minutes later, Varela was picked up by Sergeant Cook of the Los Angeles County Sheriff's Department. [R. T. 139.] The narcotics officers never saw the \$500 again. [R. T. 128, lines 17, 18.]

On November 16, 1962, a Fargo transmitter was placed on Varela's person and he was driven to the corner of Thelma and Huntington Drive. Here, he got

out of the car and walked to Lombardi's Liquor Store. [R. T. 140, 199.] Narcotics officers saw appellants Ybarra and Torres come out of the store and walk to the parking lot at the rear. [R. T. 111.] Varela entered the store and as he came back out he was met by Ybarra who said: "Go to the rear of the liquor store and wait." Varela walked away; Ybarra stood momentarily and then followed Varela to the rear of the store. [R. T. 202.] Thereafter, Varela and appellants Torres, Ybarra, and Vasquez were observed to be standing behind the liquor store [R. T. 112-113], and the following conversation, in substance, was overheard by narcotics officers over their Fargo receivers:

"Varela: Hello, Homer, how are you?"

Vasquez: Are you sure you weren't followed tonight?

Varela: I am sure I wasn't followed; I took precautions. Besides, I am going to cool my activities for a couple of weeks.

Torres: Hi, Ronnie.

Varela: Hi, Hank. What's happening?

Torres: Are you sure you haven't got a radio? (Officer hears a rustling of clothes.)

Varela: Oh, c'mon, man, I don't have a radio on. What do you take me for. You hurt my feelings by suggesting such a thing.

Torres: Well, we have to be careful. Are you sure you weren't followed tonight like you were two nights ago when you came up here?

Varela: I'm sure I wasn't followed. I got in and out of several cabs and kept watching behind me.

Torres: I'm not sure whether the guys in the Rancho the other night were the 'heat' or not, but we watched them three or four hours after you left the area. They might have been guys who gave you money and then didn't trust you and followed you to see where you were going with it.

Varela: No, that couldn't be. I'm only dealing with three people who I know quite well and trust and have no reason to think that they would follow me.

Torres: Who is this partner of yours that you keep trying to bring up here?

Varela: He is a man I have known for 14 years. We are close friends and I am sure he can be trusted.

Torres: You can't be sure of anybody. I don't want to meet him and you can stop bringing him up here. For all you know, he might be in jail now in Oxnard rather than with his family.

Varela: No, he is in Oxnard because his mother just died and his father had a nervous breakdown. He will be back in town shortly and is expected to inherit a large sum of money from his mother's estate which we intend to put into the narcotic traffic. Can you get me 40 pieces of stuff, and what kind of price can I get on it?

Torres: \$225 per ounce.

Varela: Can't I get it cheaper than that?

Torres: No, not cheaper than \$225 up here. If you want it any cheaper I can meet you in Mexico and take care of you down there.

Varela: That would mean I would have to take the risk of bringing the stuff across the border, or find somebody I could trust to bring it back.

Torres: That's right. That's the reason for the price of \$225.

Varela: Are you sure I can't get it any cheaper?

Torres: Look, Ronnie, if you can find stuff as good as mine any place in town at a cheaper price, you tell me and I'll buy all you can get.

Varela: (laughs) I'll come back up here in two weeks and I'll have \$4500 or \$9000 for stuff, and when I come back I'll tell you how the deal is going to go.

Torres: Look, Ronnie, remember this. You're buying and we're selling and I'll tell you how the deal is going to go. It's not going to go your way at all.

Varela: \$9000 is a lot of money. I don't like to bring it up here in the Rose Hills. You know what a bad reputation this area has.

Torres: Yeah. Rose Hills is a legend. The bulls would love to bust it, but they never will.

Varela: (laughs) But, \$9000 is still a lot of money. It's almost two years' wages.

Torres: It is for some people, but to us it's only a little bit.

Varela: Okay, I'll come over here and give you the money.

Torres: No. You'll give it to either Homer or Shorty; that's how it's gonna go or else we are not gonna do any business.

Varela: Okay.

Torres: Do you have the \$100 you owe us?

Varela: No.

Torres: Do you remember the first time you come up here?

Varela: Yes.

Torres: Remember, I told you I didn't want to sell any less than three ounces at a time?

Varela: That's right.

Torres: You came up here with \$250, we gave you stuff and credit for the other and we thought that you'd be able to come up here and pick up at least that much on your own. From now on, bring the money when you come up here and we'll give you the stuff. We'll have to do business that way. No more credit.

Varela: Okay.

Torres: We trust you, Ronnie. If we didn't trust you you'd never have gotten anything. I told Homer to go ahead and give you the stuff the first time. Isn't that right?

Vasquez: Yeah.

Varela: I know you trust me, Hank, and that you are not going to mess me around.

Torres: Be careful of who you give your money to. Give it to either Shorty or Homer. Some punks come up here looking for me and give their money to other people and don't get any heroin.

Varela: All right. I'll see you here two weeks from tonight. It'll be on a Friday.

Torres: All right, at 9:00 o'clock.

Varela: That'll be fine.

Torres: Well, how about 7:00 o'clock? 9:00 o'clock is kind of late.

Varela: Well, 7:00's fine with me. I only came at 9:00 because that's the time you told me to be here." [R. T. 141-146; 164-168; 201-207.]

While the above conversation was in progress, the three appellants and Varela were observed to be standing together behind the liquor store. [R. T. 39-40, 76, 112.]

After the conversation concluded, Torres and Ybarra walked through the alley behind the liquor store to Monterey Road. [R. T. 209.] None of appellants kept their scheduled appointment with Varela on November 30, 1962. [R. T. 208.] Sometime later, Varela met his death from causes not attributable to appellants, so far as the Government knows. [R. T. 271.]

On the witness stand Torres denied that he was ever behind Lombardi's Liquor Store with Vasquez, Ybarra, and Varela. [R. T. 257.] He also denied that anyone ever called him "Hank" or that he knew anyone named "Ronnie" or Varela. [R. T. 249, 252.] Torres said he had never called Vasquez "Homer" or heard him so referred to [R. T. 253], and that nobody called Ybarra "Shorty." [R. T. 254.] He denied participating in any conversation regarding narcotics, or in any narcotic transaction. [R. T. 249, 250-251.]

THE QUESTION PRESENTED.

The Sole Question Presented by this Appeal is Whether the Evidence was Sufficient to Sustain the Convictions.

ARGUMENT.

In determining the sufficiency of the evidence on appeal, the evidence is viewed in the light most favorable to the Government, including the reasonable inferences to be drawn therefrom. *Glasser v. United States*, 315 U. S. 60 (1942); *Teasley v. United States*, 292 F. 2d 460 (9 Cir. 1961); *Schino v. United States*, 209 F. 2d 67 (9 Cir. 1954).

Appellants ignore the above principle of law and apparently seek to have this court pass upon the credibility of Government witnesses insofar as certain voice identifications are concerned. Agent Briggs identified voices heard over a radio receiver as those of Varela and appellants Ybarra and Torres. He also heard a fourth voice at a time when only the above three persons and appellant Vasquez were present, so that the reasonable inference could be drawn that the fourth voice was that of Vasquez. Agent Briggs was familiar with Varela's voice, he *saw* Ybarra at the same time he heard his voice over the radio, and Torres spoke in a distinctive, slow monotone that was easily remembered. The trial judge heard Agent Briggs testify, listened to Torres' voice from the witness stand, and concluded that the voices heard over the radio receiver were those of Varela and the three appellants. On this appeal, these facts are to be taken as the trial court found them. We turn from the preliminary matter of what the evidence is, to the question of whether the evidence is sufficient to sustain the findings of guilt.

The Substantive Counts.

The three essential elements required to be proved in order to establish the offenses charged in Counts II through V are: (1) the acts of selling or concealing a narcotic drug which has been imported into the United States contrary to law, or the facilitating of such sale or concealment, (2) doing such acts knowingly and fraudulently and unlawfully, and (3) knowledge of the accused that the narcotic drug had been imported into the United States contrary to law. Elements 1 and 3 appear to be the only ones concerning which a question is raised; consequently only these need be discussed.

The acts of selling and concealing heroin, or the facilitation of such acts, is established by the following evidence: after contacting appellants, and being instructed to purchase heroin from them, Varela was furnished \$250 to purchase narcotics on October 31, 1962. On that date he met Ybarra and Vasquez and within ten or fifteen minutes after disappearing with Vasquez, he turned approximately three ounces of narcotics over to officers. Later, Torres was overheard to remark that the first time Varela bought from appellants he came with only \$250 and they gave him narcotics on credit. Torres also said that he told Vasquez to give Varela the heroin, and Vasquez acknowledged this. Ybarra was present with Vasquez and Torres while they spoke.

On November 6, 1962, Varela was supplied with \$875 and instructed to pay \$375 for the heroin received on October 31st and to make a partial payment of \$500 on another purchase of narcotics. Varela met Ybarra and they were lost from view for over an hour, after which Varela returned with narcotics. Later, Ybarra was overheard to discuss this transaction with Varela at which time Varela told Ybarra that he didn't want to have to walk all over the hills in future transactions as he had the last time. Also later, Torres was overheard to mention that Varela owed \$100 on the first transaction of three ounces, thus indicating that he received the original \$250 and the \$375 paid on November 6th.

The knowledge of appellant that the heroin they sold was imported into the United States contrary to law is established in two ways: (1) the statutory presump-

tion arising from unexplained possession of heroin, and (2) direct evidence of the required knowledge.

It is well established that the possession creating a presumption of knowledge of illegal importation of heroin need not be "actual" possession. A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over heroin, either directly or through another person or persons, is then in constructive "possession" of it within the meaning of 21 U. S. C. Section 174. *Hernandez v. United States*, 300 F. 2d 14 (9 Cir. 1962); *United States v. Cohen*, 124 F. 2d 164 (2 Cir. 1941).

The constructive possession necessary for the statutory presumption of illegal importation of narcotics may be proved by direct or circumstantial evidence. *Teasley v. United States*, 292 F. 2d 460 (9 Cir. 1961). From the evidence that appellants did deliver and cause the delivery of heroin, it is plain that they intentionally exercised dominion and control over it. Even proof of the furnishing of information as to where heroin might be picked up has been viewed as some evidence of constructive possession. *White v. United States*, 294 F. 2d 952 (9 Cir. 1961).

In any event, the Government need not rely on the statutory presumption to supply the element of knowledge that the heroin was illegally imported, since Torres, in the presence of Ybarra and Vasquez, was heard to state that the cheapest price for which he would sell the narcotic was \$225 per ounce, and that the reason for this price was the risk involved in bringing it across the border from Mexico. Clearer evidence of the required knowledge can hardly be imagined.

From the above summary, it is plain that the essential elements of the substantive offenses were all supplied by the Government's proof and appellants' convictions thereon are supported by sufficient evidence.

The Conspiracy Count.

The elements required to be proved in order to establish the conspiracy charged in Count I of the indictment are: (1) That the conspiracy described was formed and existed at about the time alleged, and that the appellants were knowing and willful members thereof, (2) That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, and (3) That such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

Appellants contend that the evidence is insufficient to establish the existence of a combination or agreement among appellants, or that such combination, if established, related only to the future and no overt act was committed in furtherance thereof. (Appellants' Brief, pp. 12-13.) The evidence as to a combination among appellants consists of Government agents' observation of them in their dealings with Varela, and appellants' own statements concerning their transactions with Varela and others. It should be noted that these remarks related to transactions occurring in the *past* as well as those planned for the future. It has been said that a "conspiracy" is usually established by a number of apparently disconnected circumstances which when taken together throw light on whether the accused have an understanding or are in common agreement. *United States v. Glasser*, 116 F. 2d 690 (7 Cir.

1941), modified on other grounds 315 U. S. 60 (1942). The existence of agreement or joint assent of minds may be inferred from the evidence taken as a whole, and no direct proof of agreement is required. *McClanahan v. United States*, 230 F. 2d 919 (3 Cir. 1956); *United States v. Pagano*, 224 F. 2d 682 (2 Cir. 1955). The evidence shows that the requirement of proof of combination or agreement was met. Appellants urge that this element cannot be established as to one conspirator by declarations of co-conspirators made in his absence. In this regard it should be noted that the declaration is usable against the declarant in any event, and that most of the declarations occurred when all appellants were present.

The second element—the commission of at least one overt act—is supplied by proof of the meeting of appellants and Varela on November 16, 1962. The remaining three overt acts charged in the indictment were also established by the evidence.

The requirement that appellants be shown to have had as their object the sale or concealment, or facilitation thereof, of heroin with knowledge that it has been illegally imported into the United States, has been adequately met by the evidence of appellants' actual sales in the past and their plans for future ones. Their knowledge that the heroin was imported into the United States unlawfully is established by the same direct evidence and statutory presumption mentioned above in regard to the substantive counts.

When considered as a whole, the evidence sustaining appellants' conviction is not merely sufficient, it is overwhelming.

IV.
CONCLUSION.

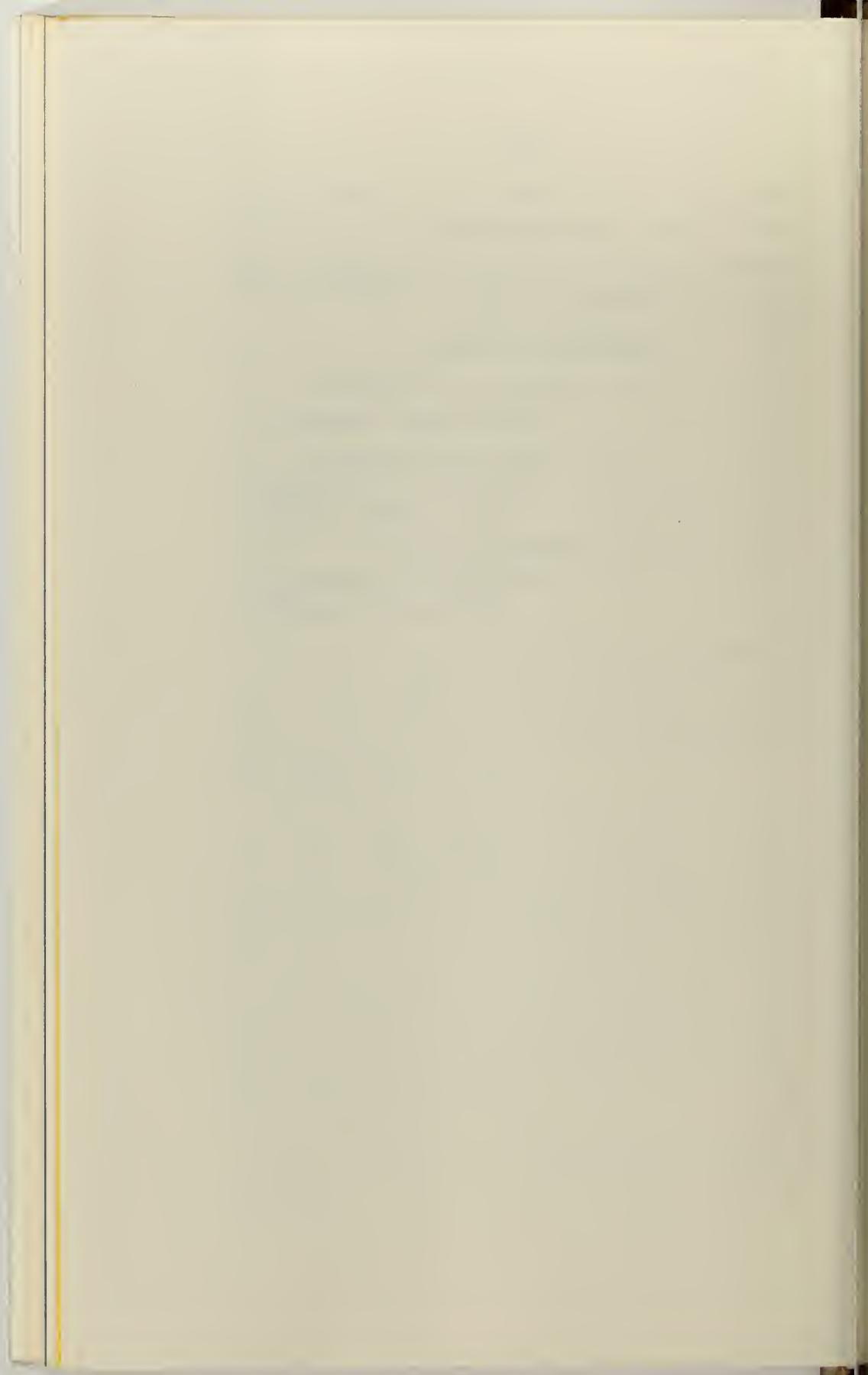
For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

DAVID R. NISSEN,
Assistant U. S. Attorney.

